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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 92 CV 7223, Courtroom 19

BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants.

Defendants Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado submit the following brief in opposition to the Plaintiffs' motions for preliminary injunction in the above-captioned action.[1]

[1]The Plaintiffs have filed two separate motions for a preliminary injunction. One was filed on December 23, 1992 on behalf of all of the Plaintiffs (for purposes of this brief, "Plaintiffs"), except for the City of Aspen and the Aspen City Council ("Aspen City Plaintiffs"), which filed their own motion on December 28, 1992. This brief responds to both motions.

This brief also serves as a reply to the Aspen City Plaintiffs' January 4, 1993 response to Defendants' Brief in Support of Motion to Dismiss; as well as a reply to the remaining plaintiffs' response to argument nine of Defendants' Brief in Support of Motion to Dismiss.

INTRODUCTORY STATEMENT

At the outset, it must be recognized that the Plaintiffs are urging this Court to take an extraordinary step, and enjoin a self-executing provision of the Colorado Constitution. As this would contravene the will of the people, the Court must be mindful that such an action has the potential to "render nominal and nugatory the transcendent right of the people to 'abolish and alter their governments as to them shall seem most likely to effect their safety and happiness.'"[2]

The Plaintiffs eschew the reasonable and fair constitutional interpretation ascribed to Amendment 2 by the Defendants, in favor of a parade of horribles having no foundation in fact. Defendants have previously articulated the clear meaning and intent of Amendment 2, and will not reproduce that discussion here. Brief in Support of Motion to Dismiss at 4-8. However, as the amendment's indisputable legislative history makes clear, its effect is twofold: 1) nullifying the effect of existing state and local laws or policies which prohibited discrimination based on homosexual or bisexual orientation; and 2) ensuring that state or local authorities could not adopt laws or policies which would have this effect. Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals (Research Publ. No. 369, 1992) at 16-17. Properly understood, the guiding intent behind Amendment 2 was not to deprive homosexuals or bisexuals of any constitu-

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[2]The Federalist, No. 40 (J. Madison)(quoting the Declaration of Independence.)

tionally guaranteed rights, but to remove any state-based grounds for putting such individuals in a more favorable position vis-a-vis other citizens than would be required under federal law. Simply put, the intent was to realign the rights of the citizenry of this State with that provided by federal law.

Plaintiffs' exegesis regarding the so-called "religious right," serves no legally relevant purpose to this litigation, and only serves to exacerbate public and private divisiveness on this issue. Further, the Plaintiffs' exploration of the motives behind certain individual proponents or supporters of Amendment 2, if accepted by the Court as fact, would profoundly undermine voter sovereignty in this State and directly attack the political and constitutional structure presently in place. Likewise, comparisons between the supporters of Amendment 2 and Naziism should not be accorded dignity by this Court. The sole question now before this Court is whether Amendment 2 is consistent with the Constitution of the United States, not whether it is appropriate or desirable to adopt a particular social or political ideology.

SUMMARY OF THE ARGUMENT

1. No inquiry should be permitted into any particular individual or group's motivation for seeking passage of Amendment 2; this Court may take judicial notice of the pertinent legislative history in order to determine the meaning, effect, and legitimate purposes of Amendment 2 (Defendants' Argument I).

2. As a matter of law, the Plaintiffs cannot meet the requirements for obtaining a preliminary injunction. They cannot show beyond a reasonable doubt that they are likely to succeed in their challenge to Amendment 2. Nor can they show that they are exposed to real, immediate, or irreparable injury. Furthermore, they are unable to prove the lack of a plain, speedy, and adequate remedy at law or that the public interest and balance of equities favor granting them relief (Defendants' Arguments II-VII).

ARGUMENT

I. NO INQUIRY SHOULD BE PERMITTED INTO ANY PARTICULAR INDIVIDUAL OR GROUP'S MOTIVATION FOR SUPPORTING AMENDMENT 2

As a threshold matter, it must be recognized that Plaintiffs have sought an interpretation of Amendment 2 which necessarily renders it constitutionally suspect. In contrast, Defendants have advanced a view of the amendment which, while being a fair reading of its language and consistent with the understanding of the people, further avoids possible constitutional infirmities. It is axiomatic that, to the extent the intent of Amendment 2 is at issue, the Court is obliged to look in the first instance to the Legislative Council's analysis of the amendment, which provides important insight into the electorate's understanding of the amendment when it passed, Carrera Place, Ltd. v. Arapahoe County Bd. of Equalization, 761 P.2d 197, 203 (Colo. 1988),[3] and to give

[3]The Court can take judicial notice of this, and, if necessary, other pertinent legislative history, i.e., documents submitted to, and tapes of testimony before, the Legislative Council and the

great deference to the interpretation of the State as expressed by the Attorney General. White v. Anderson, 155 Colo. 291, 297, 394 P.2d 333, 336 (1964).

Although "the evident contemporary interpretation of those actively promoting the amendment, should be accorded considerable weight," Carerra Place, 761 P.2d at 202, the "bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis." Arthur v. City of Toledo, 782 F.2d 565, 573-74 (6th Cir. 1986)(quoting Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1292 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978)). There are important reasons why Plaintiffs' attempts to extrapolate tenuous conclusions from selected statements by a small group of proponents should be rejected by this Court, including the tradition of the secret ballot, the U.S. Supreme Court's recognition of the value of referendum elections,[4] and the inherent pitfalls of ascribing a uniform "intent" to literally hundreds of thousands of voters. See generally Arthur, 782 F.2d at 573-74.[5]

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title ballot board. See generally Territory of Alaska v. American Can Co., 358 U.S. 224, 226-27 (1959); In Re Interrogatory Propounded by the Governor, 814 P.2d 875, 880 (Colo. 1991); In Re Senate Bill 95 of Forty-Third General Assembly, 146 Colo. 233, 361 P.2d 350, 353 (1961).

[4] E.g. James v. Valtierra, 402 U.S. 137, 141 (1971).

[5] "Since a court cannot ask voters how they voted or why they voted that way, a court has no way of ascertaining what motivated the electorate." Arthur v. City of Toledo, 782 F.2d 565, 573 (6th Cir. 1986). "Carried to its logical extreme, plaintiffs-appellants could establish a violation of the equal protection clause if one voter testified that racial considerations motivated the voter's vote to repeal the sewer extension ordinances." Id. at 574.

It is for these reasons that the Sixth Circuit noted that:

> neither the [U.S.] Supreme Court nor this Court has ever inquired into the motivation of voters in an equal protection clause challenge to a referendum election involving a facially neutral referendum unless racial discrimination was the only possible motivation behind the referendum results.

782 F.2d at 573 (footnote omitted).

In this light, the submission of evidence to establish an "intent" behind Amendment 2, at variance with its clear meaning, should be rejected out of hand. "We hold that absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." Id. at 574. "Just as a juror cannot set aside a jury verdict, courts should not permit a member of the electorate or an expert witness to set aside an election or referendum." Id.[6] Therefore, it would be error for this Court to consider extrinsic, anecdotal evidence on the so-called "religious right," the attributes of American culture, and statements from individual supporters of Amendment 2, purporting to establish an impermissable purpose for it. This is especially so since, as is noted in the Defendants' discussion of equal protection, infra at 27-29, the Court's ultimate focus is not on

[6] "Accordingly, we conclude that we cannot apply the 'motivating factor' test to equal protection clause challenges to referendum elections." Arthur, 782 F.2d at 574.

contemporaneous expressions of purpose,[7] but on whether any conceivable legitimate purpose or combination of purposes exist to sustain the amendment.

Moreover, the Plaintiffs conveniently omit selected portions of Amendment 2's legislative history which are replete with references to: (1) the accurate belief that extension of special protections on the basis of homosexuality or bisexuality is unwarranted under current U.S. Supreme Court and other federal authorities;[8] (2) the fact that sexual orientation was the only civil rights issue taken to the municipal level without beenefit of federally-sanctioned laws;[9] (3) the ease by which special class status could be exploited;[10] (4) the unjustifiable dilution of both public respect and resources for current civil rights programs which would result from extending special class protections to

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[7]The legislative history here also includes a letter from John Franklin, former Chairman of the Colorado Civil Rights Commission. In the letter he agreed that special class status for homosexuals could be easily exploited. Additionally, he indicated that extending special protect status to homsexuals would unjustifiably dilute both the respect and the resources for current civil rights programs.

[8]An Analysis of 1992 Ballot Proposals at 18; letter from Colorado for Family Values Director Kevin Tebedo to Stan Elofson, Colorado Legislative Council (July 23, 1992); statement by Tony Marco submitte to Colorado Legislative Council (1991) at 24-30.

[9]Letter from Kevin Tebedo. See also An Analysis of 1992 Ballot Proposals at 17.

[10]Letter from Kevin Tebedo; letter from John N. Franklin, former Chairman of the Colorado Civil Rights Commission (Mar. 4, 1992).

homosexuals and bisexuals;[11] (5) the existence of a significant issue regarding whether behavioral inclinations which are perceived to be immoral ought to serve as the basis for special protections;[12] and (6) the desire to further associational and religious rights.[13] This record amply supports a finding of legitimate governmental purpose.

II. AS A MATTER OF LAW, THE PLAINTIFFS CANNOT MEET THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION

In order to obtain a preliminary injunction, the Plaintiffs must demonstrate that:

1. They have a reasonable probability of success on the merits of the entire case;

2. There is a danger of real, immediate, and irreparable injury to the Plaintiffs which may be prevented by injunctive relief;

3. There is no plain, speedy, or adequate remedy at law;

4. The granting of the preliminary injunction will not disserve the public interest;

5. The balance of the equities favors the injunction; and

6. The injunction will preserve the status quo pending a trial on the merits.

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[11] An Analysis of Ballot Proposals at 19; letter of John N. Franklin.

[12] Letter of Kevin Tebedo.

[13] An Analysis of 1992 Ballot Propsosals at 18; statement of Marcos at 21.

See, e.g., Wakabayashi v. Tooley, 648 P.2d 655, 657 (Colo. 1982); Rathke v. McFarlane, 648 P.2d 648, 653-54 (Colo. 1982). If the Plaintiffs cannot meet each and every one of the six criteria, then injunctive relief may not be granted. Rathke, 648 P.2d at 654; Otero Savings and Loan Ass'n v. Federal Reserve Bank, 665 F.2d 275 (10th Cir. 1981).

An injunction is a drastic remedy to be exercised with caution, and should be granted only in cases where necessity is clearly established. Goldammer v. Fay, 326 F.2d 268, 270 (10th Cir 1964). If the Court is left in doubt, it should deny such relief. Furthermore, injunctive relief should not be granted in the absence of substantial evidence warranting it. City and County of Denver v. Glendale Water and Sanitation District, 152 Colo. 39, 43, 380 P.2d 553 (1963). The Plaintiffs must make a "clear showing" to the trial court that the injunctive relief is necessary to protect existing rights. Rathke, supra, 648 P.2d at 653. Testimony of fear, apprehension, and possibilities is not sufficient to establish any injury, let alone an irreparable injury, nor is the remote possibility of some feared wrong in the future sufficient to support an award of injunctive relief. The harm to be enjoined may not be speculative or based upon conjecture. See American Investors Life Ins. Co. v. Green Shield Plan, Inc., 145 Colo. 188, 358 P.2d 473, 475 (1961); U-470 Concerned Citizens v. U-470 Highway Auth., 809 P.2d 1041, 1044 (Colo. App. 1990).

Moreover, inasmuch as the Plaintiffs claim Amendment 2 violates the U.S. Constitution, they must clearly establish prob-

ability of success beyond a reasonable doubt. Rathke, 648 P.2d at 655. Plaintiffs cannot, as a matter of law, meet their burdens with respect to each of the first five elements,[14] and their motions should be summarily denied.

III. THE PLAINTIFFS CANNOT, AS A MATTER OF LAW, SHOW A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS

Plaintiffs cannot show a reasonable probability of success beyond a reasonable doubt here. This is so because the Plaintiffs' theories of the case are not supported by either law or fact.

A. Amendment 2 Does Not Violate the Plaintiffs' Right to Engage in Expressive Conduct

In both their original Complaint and Amended Complaint, the Plaintiffs claim that, on its face, Amendment 2 violates their freedom of expression because it (1) excludes a particular idea or belief regarding sexual orientation from being acted on through normal legislative, executive, and judicial processes; (2) has the purpose and effect of limiting individual and collective advocacy of political, social, and economic change on their behalf; and (3) requires individuals to adopt a state-sponsored viewpoint of homosexuality and bisexuality. In requesting a preliminary injunction, Plaintiffs apparently limit their claim to asserting that Amendment 2 violates the First Amendment to the United States

[14]Apparently, Amendemnt 2 has altered the status quo in Denver, Boulder, and Aspen, but has not altered the status quo throughout the rest of the State.

Constitution because it allegedly "increases the risk for lesbians, gay men and bisexuals of engaging in expressive conduct." Plaintiffs' Brief in Support at 42.[15]

To the extent some homosexuals and bisexuals might experience difficulties in "going public" in the aftermath of the passage of Amendment 2, such difficulties are not unique. For example, when government prohibits racial, sexual, or religious discrimination, white supremacist groups might face increased risks for expressing their viewpoints. Yet, the courts do not regard this increased risk as a violation of the freedom of expression. Similarly, any increased risk to the Plaintiffs would not be regarded as a violation of the Plaintiffs' freedom of expression.

Presumably, the Plaintiffs believe that the First Amendment guarantees that all expression of any viewpoint will be free from risk of retaliation, reprisal, or other consequences from those private parties who might disagree. In effect, the Plaintiffs assert that the First Amendment protects their viewpoints from both governmental and private censorship and from both private and public consequences.

Such an interpretation of the First Amendment has no basis in law. Even if the Plaintiffs can somehow demonstrate that Amendment 2 has increased the risk of espousing certain viewpoints, increased risk of negative reaction from private parties does not constitute

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[15]In the event that Plaintiffs attempt to reassert the claims made in their original and amended complaints for purposes of the preliminary injunction, Defendants incorporate by reference herein pages 31-39 of Defendants' Brief in Support of Motion to Dismiss.

a violation of the First Amendment. See Student Government Ass'n v. Board of Trustees of the Univ. of Massachusetts, 868 F.2d 473, 479 (1st Cir. 1989)(government is under no obligation to remove barriers to expression that are not created by the government).[16] The First Amendment merely guarantees the right to express viewpoints free from governmental interference; it does not guarantee that the expression of those viewpoints will receive a positive response from either public or private actors or even that the message will be heard.[17] Cf. Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979)(First Amendment "provides no guarantee that a speech will persuade or advocacy will be effective, nor does it 'impose any affirmative obligation on the government to listen or to respond'"); Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 288 (1984)("A person's right to speak is not infringed when government simply ignores that

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[16]See also May v. Evansville Vanderburgh School Corp., 787 F.2d 1105, 1109 (7th Cir. 1986); R.C. Maxwell Co. v. Borough of New Hope, 735 F.2d 85, 87 (3d Cir. 1984)(First Amendment does not apply to private actions, only those of public parties). Cf. Hinman v. Lincoln Towing Services, Inc., 771 F.2d 189, 194 (6th Cir. 1985)(Constitution is a charter of negative liberties and does not impose any affirmative obligations to provide services or special protections).

[17]Moreover, the Plaintiffs appear to believe that the First Amendment's freedom of expression protects one's status as a homosexual or bisexual, the performance of homosexual or bisexual acts, and the expression of viewpoints about homosexuality or bisexuality. This is incorrect. At most, the First Amendment protects the expression of viewpoints about homosexuality or bisexuality from governmental censorship. Neither the First Amendment nor any other constitutional provision protects homosexual or bisexual acts or one's status as a homosexual or bisexual. See Bowers v. Hardwick, 478 U.S. 1039 (1986). See also n.22, infra.

person while listening to others"); Canfora v. Olds, 562 F.2d 363, 364 (6th Cir. 1977)("neither the First Amendment nor elsewhere in the Constitution is there a provision guaranteeing that all petitions for the redress of grievances will meet with success").

Every day, thousands of Coloradans refrain from expressing viewpoints on a variety of subjects because of fears of various forms of retaliation from private parties. The First Amendment simply means that a viewpoint will not be censored or chilled by the government; it does not mean that there will be no consequences from private parties for the expression of viewpoints.[18] Cf. Bohen v. City of East Chicago, 622 F. Supp. 1234, 1247, 1248 (N.D. Ind. 1985), aff'd in part, rev'd in part, 799 F.2d 1180 (7th Cir. 1986)(Constitution does not protect one from the obnoxious behavior and harassment of other private individuals).

In addition, the Plaintiffs' reliance on cases where government has been precluded from compelling expression because of possible retaliation by private parties, such as N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), is misguided. Unlike Patterson, where the State wished to compel a form of expression which would inevitably lead to the private retaliation against specific individuals, the present case involves neither a compulsion nor a prohibition on expression. Moreover, unlike

[18]Although in some specific instances, government may be under some sort of obligation to protect demonstrators from potential harms such as mob violence, See Edwards v. South Carolina, 372 U.S. 229, 236-37 (1963), there is no general mandate for police protection from those who might disagree with the views being expressed. Sherrill by and through Wooden v. City of Longview, 683 F. Supp. 1108, 1112-13 (E.D. Tex. 1987).

Patterson, the Plaintiffs cannot identify a relatively small group of specific individuals. Thus, even if there is an increased risk to the Plaintiffs because of Amendment 2, the risk is far more remote and the link to the State far more tenuous than the risk presented in Patterson and similar cases.

Furthermore, contrary to the assertions of the Plaintiffs, Amendment 2 does not remove the right of the Plaintiffs or anyone else to seek redress for private acts of retaliation against them. Just as a person who is beaten or harrassed because of their religious or political views can seek redress from their attacker in a civil or criminal prosecution, a person who is beaten or harassed because of his/her views on homosexuality and bisexuality can seek criminal or civil redress.

Finally, the Plaintiffs' reliance upon Merrick v. Board of Higher Education, 116 Or. App. 258, ___ P.2d ___ (1992) is misplaced. The issue here is solely whether Amendment 2 violates the First Amendment to the United States Constitution.[19] Merrick does not address that issue. In invalidating a statute because it inhibited expression regarding sexual orientation, the Oregon court in Merrick based its decision solely on an interpretation of its own state constitutional guarantee of freedom of expression.

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[19]Colorado's equivalent of the First Amendment, Colo. Const. art. II, § 10, could also normally be viewed as providing more protections than its federal counterpart. E.g. Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991). However, this is not the case here. A later enacted constitutional provision cannot violate an earlier enacted provision because "the people can do anything by constitutional amendment unless prohibited by the terms of the Constitution of the United States." Cooper Motors, Inc. v. Board of County Comm'rs, 131 Colo. 78, 84, 279 P.2d 685, 688 (1955).

Because Oregon's state constitution provides greater protection than the First Amendment,[20] the Merrick decision is not even persuasive authority for resolving the issues in this case.[21]

B. Amendment 2 Does Not Violate the Federal Constitutional Right to Equal Protection of the Laws

Plaintiffs assert that Amendment 2 abridges the Fourteenth Amendment's Equal Protection Clause because, in their view, Amendment 2 (1) impermissibly restricts the ability of a particular minority group -- homosexuals and bisexuals -- to bring about change through ordinary political processes at the local or state general assembly levels; and (2) creates a constitutional right to discriminate in any manner against homosexuals and bisexuals. Plaintiffs Brief in Support at 24-33.

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[20]Compare Merrick v. Board of Higher Education, 116 Or. App. 258, ___ P.2d ___ (1992), slip op. at 3, and State v. Moyle, 299 Or. 691, 702, 705 P.2d 740, 748 (1985)(expression is protected regardless of context; both political and non-political speech are protected equally), with Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(speech can be proscribed where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). See also Board of Trustees, State Univ. of New York v. Fox, 492 U.S. 469, 476-78 (1989); Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340 (1986)(both upholding restrictions on speech which advocated legal activity).

[21]Indeed, Oregon courts have adopted a unique practice of always resolving state constitutional claims before turning to the federal constitutional claims. See State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983). Consequently, the state courts in Oregon have effectively abdicated their role as developers of federal law. Utter, Ensuring Principled Development of State Constitutional Law: Responsibilities for Attorneys and Courts, 1 Emerging Issues in State Const. Law 217, 223 (1988).

1. Amendment 2 Does Not Impermissibly Burden Participation in the Political Processes

Plaintiffs complain that Amendment 2 is directed at depriving a single, identifiable minority group of the ability to seek special (and not constitutionally required) antidiscrimination protections from local or state authorities. Consequently, they say, Amendment 2 burdens their fundamental right to participate in political processes and that the amendment cannot be upheld in the absence of a showing of a "compelling state interest."

The Fourteenth Amendment's Equal Protection Clause is "essentially a direction that all persons similarly situated . . . be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The "general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Id. at 440. See Harris v. the Ark, 810 P.2d 226, 230 (Colo. 1991). This general rule "gives way," however, when statutes infringe upon fundamental constitutional rights or affect one of a few number of "suspect" or "quasi-suspect" classes of people. Cleburne at 440-41; Harris, 810 P.2d at 230; Parrish v. Lamm, 758 P.2d 1356, 1370 (Colo. 1988). In such cases, the courts apply "heightened" scrutiny requiring the state to show, in cases affecting fundamental rights or "suspect" classes, a "compelling state interest," or, in cases affecting "quasi-suspect" classes, a substantial relationship to a sufficiently important governmental

interest. Cleburne, 473 U.S. at 440-42; Parrish v. Lamm, 758 P.2d at 1370.

The Plaintiffs here attempt to rely on the fundamental rights prong. Although the Plaintiffs believe "classifications based on homosexual orientation are inherently suspect and should be subject to strict scrutiny," they apparently have abandoned such a position for this litigation,[22] arguing instead that Amendment 2 either violates a fundamental right, or has no rational basis. Plaintiffs' Brief in Support at 31-32 n.29 (emphasis in original).

Plaintiffs rely upon a footnote in a recent California Court of Appeals case indicating that "[a]rguably" Amendment 2 "attempts to restrict the right to petition the government . . . because the right becomes a hollow exercise if the local government has been deprived of the power to grant redress of the subject grievance." Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 655 n.9 (Cal. App. 4 Dist. 1991). However, as pointed out at pp. 28-31 of Defendants' Brief in Support of their Motion to Dismiss, there is no requirement that legislative, executive, and judicial bodies be allowed to act with respect to every conceivable viewpoint. See, e.g., Smith v. Arkansas State Highway Employees,

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[22]The wisdom of this tact is apparent, inasmuch as they cannot, as a matter of law, qualify as a "suspect" or "quasi-suspect" class. See, e.g., High Tech Gays v. Defense Investigations Security Clearance Office, 895 F.2d 563, reh'g denied, 909 F.2d 375 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) cert. denied sub. nom., 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); National Gay Task force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1988), aff'd, 470 U.S. 903 (1985); Steffan v. Cheney, 780 F.Supp. 1 (D. D.C. 1991).

Local 1315, 441 U.S. 463, 464-65 (1979)(the First Amendment does not "impose any affirmative obligation on the government to listen or to respond . . . .")

Undaunted, Plaintiffs point to several federal cases, which, properly analyzed, again do not support their position. Although, in both Hunter v. Erickson, 393 U.S. 385, 393 (1969) and Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 468 (1982), the Supreme Court struck down provisions which would have made it more difficult for a cognizable group to push through protective measures at a local level,[23] However, as these (and other cases) demonstrate, the basis for decision was not infringement upon a fundamental right, but discriminatory action against the already identified "suspect" classification of race.

In Hunter, the Court was concerned with a provision which "place[d] special burdens on racial minorities within the governmental process." 387 U.S. at 391. And immediately before analyzing the grounds urged in support of the provision, the Court had noted:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are

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[23]See Hunter v. Erickson, 393 U.S. 385, 393 (1969)(amendment to city charter repealed certain type of antidiscrimination ordinance passed by city council and required voter approval of that type of antidiscrimination ordinance before it could be put into effect); Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 468 (1982)(voter initiated statute removed previous power of school boards to order busing for purpose of desegregating schools); Lee v. Nyquist, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971) (state legislature's statute barred state education officials and appointed school boards from taking action to integrate schools).

> 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications.

Id. at 391-92 (citations omitted).

A year after Hunter was decided, the Court in Lee noted "[t]he principle of Hunter is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." 318 F. Supp. at 718.[24] And, two years after Hunter was decided, the Supreme Court was asked to apply it in James v. Valtierra, 402 U.S. 137 (1971), a case concerning the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of Hunter, that the California measure unconstitutionally discriminated against poor people in the right to seek redress from governmental entities. On appeal, however, the Supreme Court disagreed, finding that, unlike Hunter,

> it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . . The present case could be affirmed only by extending Hunter, and this we decline to do. . . . [A]ppellees contend that Article XXXIV denies them equal protection because it demands a mandatory referendum while many other referendums only take place upon citizen initiative. They suggest that

[24] See also Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975)(characterizing Hunter as striking "down a city charter amendment requiring voter approval of certain antidiscrimination ordinances on the ground that the amendment created a classification based on race.")

> the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a law-making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

402 U.S. at 141-42.

Eleven years later, Justice Lewis F. Powell echoed some of the very same sentiments:

> The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.

Seattle School Dist. No. 1, 458 U.S. at 496 (Powell, J., dissenting).

Admittedly, Justice Powell's comments were made in the course of issuing a vigorous dissent on behalf of four members of the Court. However, these comments lose none of their persuasive value in the present context since the majority opinion in Seattle School District rested squarely on "an immediate and crucial difference"

from the present case: a race-based classification. Indeed, the majority in Seattle School District No. 1 wrote:

> the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decision-making process.

458 U.S. at 470 (emphasis in original). Later in that same opinion, the majority wrote:

> When the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'

458 U.S. at 486.

Properly analyzed, Hunter, Lee, Valtierra, and Seattle School Dist. No. 1 are not fundamental rights cases; rather, they recognize a cause for constitutional equal protection complaint only when the political process has been restructured to place unusual burdens upon racial groups,[25] or, in the most expansive sense, upon "those groups . . . relegated to such a position of

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[25]See Note, The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy, 38 Vand. L. Rev. 397, 421-26 (1985)(Hunter doctrine limited to state action embodying a racial classification).

political powerlessness as to command extraordinary protection from majoritarian political process." Seattle School Dist. No. 1, 458 U.S. at 486. These latter groups are, of course, the few which have been identified as "suspect" classes.[26]

Plaintiffs have also relied on other U.S. Supreme Court decisions which are inapposite here.[27] This is not, after all, a case where homosexuals and bisexuals have been denied the right to vote in upcoming general elections, see Hill v. Stone, 421 U.S. 289 (1975)(voters in city bond elections limited to persons who have made available some real, mixed, or personal property); Kramer v. Union Free School Dist., 395 U.S. 621 (1969)(voters in school district election limited to persons owning or leasing taxable real

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[26]See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)(cited in Seattle School District; "political powerlessness" phrase used to describe suspect class); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)(reiterating Rodriguez test for suspect class; also, correlating the "discrete and insular minorities" language of United States v. Carolene Products Co., 304 U.S. 144, 152-53 n. 4 (1938) to the concept of "suspect" class). See also Citizens for Responsible Behavior, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4 Dist. 1991)("Hunter was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics.")

[27]Similarly, Plaintiffs' attempt to cite The Federalist, No. 51 (J. Madison) as supporting the notion that "measures that restrict any identifiable group's ability to bring about change through the ordinary political processes are highly suspect under the Equal Protection Clause." Plaintiffs' Brief in Support at 28. Of course, Federalist No. 51 says no such thing. In Madison's day women, non-property holders, and felons, to say nothing of blacks held in chattel slavery, were all identifiable groups who were explicitly prohibited from participating in ordinary political processes. This, coupled with the fact that the Federalist Papers were authored some eight decades before the framing of the Fourteenth Amendment, suggests a "creative" approach to the use of authority, and must necessarily call into question the overall credibility of Plaintiffs' arguments.

property or parents or custodians of children enrolled in schools), nor where reapportionment or other state action has demeaned the value of their individual votes, see Reynolds v. Sims, 377 U.S. 533 (1964).[28] Because the Plaintiffs have relinquished the claim that they are a suspect class, they must also relinquish the claim that Amendment 2 violates the Equal Protection Clause by limiting them to petitioning local and state legislators, or the people themselves, to assist them in getting Amendment 2 repealed.

2. Amendment 2 Does Not Endorse Wholesale Discrimination Against Homosexuals and Bisexuals

Plaintiffs overstate their claim by suggesting that Amendment 2 authorizes any and all manner of public and private discrimination against homosexuals and bisexuals. Plaintiffs' Brief in Support at 24. Amendment 2 does not leave homosexuals and bisexuals unprotected from governmental or private discrimination per se. The government must always have a rational basis to discriminate against homosexuals and bisexuals, and that rational basis must be applied to the specific context under consideration. See Brief in Support of Defendants' Motion to Dismiss at 51. No government can, for instance, make employment decisions about

[28]"The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond the warranty of mathematical equivalency of votes." Mrazek v. Sufolk County board of Elections, 630 F.2d 890, 898 (2d Cir. 1980). "Of course, the effectiveness of any citizen's voice in governmental affairs can be determined only in relationship to the power of other citizens' votes." Kramer v. Union Free School Dist., 395 U.S. 621, 627 n.7 (1969).

homosexuals and bisexuals for reasons which are irrelevant to the performance of a particular job. Nor can government deny to homosexuals and bisexuals the protections provided by law enforcement authorities. Similarly, Amendment 2 does not immunize private citizens from criminal (or civil) responsibility for assaultive activities, and confers no right upon private citizens to avoid contract obligations entered into with homosexuals and bisexuals. All Amendment 2 does -- for the private citizen -- is ensure that state or local government will not interfere with his or her choice about associating with homosexuals and bisexuals. If anything, all Amendment 2 does is re-confer the pre-existing common-law right of initial non-association with homosexuals and bisexuals.

Citing Reitman v. Mulkey, 387 U.S. 369 (1967), however, the Plaintiffs still complain that Amendment 2 involves the State in impermissible discriminatory action against them. In Reitman, the U.S. Supreme Court reviewed a California Supreme Court ruling invalidating a constitutional amendment which secured to private individuals the absolute discretion to determine to whom to sell or rent their real property. After considering the measure's immediate object, ultimate effect, and historical context, the California court had concluded that the right to discriminate on racial grounds, was now embodied in the State's basic charter. 387 U.S. at 377. The U.S. Supreme Court noted that the California court "did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of

an existing law prohibiting racial discriminations in housing; nor did the court rule that a State may never put in statutory form an existing policy of neutrality with respect to private discriminations." Id. at 376. Nonetheless, the U.S. Supreme Court found "no persuasive considerations" to overturn the California court's judgment that the amendment would impermissibly "significantly encourage and involve the State in private discriminations" based on race. 387 U.S. at 381.

The holding in Reitman was hotly contested,[29] and it has been

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[29]Justice Harlan, writing for a four-person dissent, saw that the majority had "contriv[ed] a new and ill-defined constitutional concept to allow federal judicial interference . . . ." 387 U.S. at 396.

> Here . . . we have only the straightforward adoption of a neutral provision restoring to the sphere of free choice, left untouched by the Fourteenth Amendment, private behavior with a limited area of the racial problem. The denial of equal protection emerges only from the conclusion by the Court that the implementation of a new policy of governmental neutrality, embodied in a constitutional provision and replacing a former policy of antidiscrimination, has the effect of lending en-couragement to those who wish to discriminate . . . . [T]his conclusion appears to state to me only a truism: people who want to discriminate but were previously forbidden to do so by state law are now left free because the State has chosen to have no law on the subject at all. Obviously whenever there is a change in the law it will have resulted from the concerted activity of those who desire the change, and its enactment will allow those supporting the legislation to pursue their private goals.
>
> A moment of thought will reveal the far-reaching possi-bilities of the Court's new doctrine, which I am sure the Court does not intend. There can be little doubt that such

largely limited to its specific factual context, i.e., racial discrimination.[30] In this regard, state action discriminating on the basis of race "is presumptively invalid and can be upheld only upon an extraordinary justification." Seattle School Dist. No. 1, 458 U.S. at 485. Here, in contrast to race, homosexuals and bisexuals do not constitute a suspect class requiring of such extraordinary protection. See discussion at n.22, supra. Consequently, the "rational basis" test is the appropriate standard for assessing the validity of Amendment 2. See Kardramas v. Dickinson Public Schools, 487 U.S. 450, 472 (1988); United States v. Dovan, 909 F.2d 412, 416 (10th Cir. 1990). See also Citizens for Responsible Behavior, 2 Cal. Rptr. 2d at 657-58 (citing Reitman

> permissiveness -- whether by express constitutional or statutory provision, or implicit in the common law -- to some extent 'encourages' those who wish to dis-criminate to do so. Under this theory of 'state action' in the form of laws that do nothing more than passively permit private discrimination could be said to tinge all private discrimination with the taint of unconstitutional state encouragement.

Reitman, 387 U.S. at 394-95 (Harlan, J., dissenting).

[30]Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970)("racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts . . . ")(Friendly, J., concurring). See also Fletcher v. Rhode Island Hospital Trust Nat'l Bank, 496 F.2d 927, 931 (1st Cir. 1974) and Benschoter v. First Nat'l Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042, 1047 (1975)(both citing Judge Friendly's concurrence with approval). Accord Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150, 155 (7th Cir. 1975)(distinguishing Reitman v. Mulkey, 387 U.S. 369 (1967); Howe v. United Parcel Service, Inc., 379 F. Supp. 667, 674 (S.D. Iowa 1974)(a "double standard" exists for determining "state action" in race and other suspect class cases).

and using only rational basis test for analyzing claim of discrimination against homosexuals).

3. Amendment 2 is Supported by Adequate Rational Bases

Under the rational basis test, the United States Supreme Court:

> presumes that, absent some reason to infer antipathy, even improvident decisions will be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch acted. Thus, we will not overturn such a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Vance v. Bradley, 440 U.S. 93, 97 (1979). See also MSM Farms, Inc. v. Spire, 927 F.2d 330, 333 (8th Cir. 1991)(applying rational test to measures adopted through referendum). In effect, in applying the rational basis test, this Court must ask whether it is conceivable that Amendment 2 bears some rational relationship to any legitimate purpose of government. See Pennell v. City of San Jose, 485 U.S. 1, 14 (1988).[31]

Citing Citizens for Responsible Behavior, Plaintiffs claim that no rational basis can be shown to support Amendment 2. In Citizens for Responsible Behavior, the California Court of Appeals held invalid a proposed initiative measure entitled "Citizens'

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[31]See also Brubaker v. Cavanaugh, 741 F.2d 318, 321 (10th Cir. 1984).

Ordinance Pertaining to Homosexuality and AIDS."[32] The court found that the reasons proffered by a California citizens' group for the ordinance -- purported bizarre practices, gross promiscuity, and willful exposure to probable disease -- insufficient to justify it. 2 Cal. App. 2d at 657-59.

Assuming arguendo the correctness of the California court's assessment, Defendants note that the purposes advanced in that case are not those offered here in support of the narrower Amendment 2. Although references to some of these same reasons appear in materials submitted by the amendment's sponsors to the Legislative Council, this Court is not limited solely to those reasons. E.g., Thomas v. Sullivan, 922 F.2d 132, 136 (2d Cir. 1990). Rather, the Court must consider any rational purpose possibly motivating its passage. Mountain Water Co. v. Montana Dep't of Public Service Regulation, 919 F.2d 593, 597 (9th Cir. 1990). See also Millis v. Board of County Comm'rs of Larimer County, 626 P.2d 652, 658 (Colo. 1981). Further, "if any state of facts reasonably may be conceived to justify it," Amendment 2 must be upheld. Sullivan v. Stroop, 496 U.S. 478, 485 (1990).[33] Indeed, the State may pursue legitimate

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[32]The measure would have repealed parts of antidiscrimination ordinances referring to "sexual orientation" and "AIDS sufferers;" and it would have barred the city from enacting any policy or law classifying AIDS or homosexuality as the basis for an unlawful discriminatory practice, providing preferential treatment or affirmative action on the basis of sexual orientation or AIDS, or promoting, encouraging, endorsing, legitimizing, or justifying homosexuality.

[33]See also Roley v. Pierce County Fire Protection Dist. No. 4, 869 F.2d 491, 493 (9th Cir. 1989) Dimond v. District of Columbia, 792 F.2d 179, 186 (D.C. Cir. 1986); Wheeler v. United States, 768 F.2d 1333, 1337 (Fed. Cir. 1985), cert. denied, 474 U.S. 1081

objectives through means that are imperfect, even "illogical . . . and unscientific." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980).

Moreover, contrary to the Plaintiffs' assertions, it is the party challenging the constitutionality which must convince the Court beyond a reasonable doubt,[34] that no conceivable purpose for Amendment 2 is rationally related to a legitimate governmental interest. See Vance, 440 U.S. at 101, 111.[35]

Analysis of Amendment 2 easily reveals a sufficient fit its between legitimate goals and chosen means. As set forth in Defendants' Brief in Support of their Motion to Dismiss, the legitimate goals supporting Amendment 2 include promoting associational and religious rights, maintaining the integrity of established civil right protections, and achieving statewide uniformity on this divisive issue.

The Plaintiffs first dispute that the Amendment is rationally related to protecting free exercise of religion. Plaintiffs suggest that full religious protection would block the application of all civil rights laws. It is entirely rational, however, for

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(1986).

[34]See People v. Ford, 773 P.2d 1059, 1062 (Colo. 1989).

[35]The Plaintiffs' reliance on City of Cleburne v. Cleburne Learning Center, 473 U.S. 432 (1985) for the proposition that the State must prove rationality is misguided. Such a change in the law, which would be both fundamental and far-reaching, was not accomplished by Cleburne. See Baker v. City of Concord, 916 F.2d 744, 748 (1st Cir. 1990). See also Schilb v. Kuebel, 404 U.S. 357, 364 (1971); United States v. Maryland Savings-Share Corp., 400 U.S. 4, 6 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955).

the State recognize that the free exercise of religion is a competing constitutional value, and to attempt to strike an appropriate balance. Moreover, even if religious objections could be raised to other civil rights laws, the State could rationally recognize a strong interest in maintaining special civil rights protections for classifications already deemed suspect, or as to which a statewide (legislative or popular) consensus exists, but not for other groups. Finally, it is no challenge, under rational basis review, to say that a law could have been more or less inclusive. United States R.R. Retirement, 449 U.S. at 177-79. Equal protection does not forbid the State from addressing policy objectives on an incremental basis. Williams v. Lee Optical, 348 U.S. 483, 489 (1955).

For similar reasons, the Plaintiffs fail in their attack on Amendment 2's tendency to promote freedom of association. The Plaintiffs assert that special protections for gays would not burden associational rights any more than existing civil rights laws. The argument contains its own refutation: the addition of any new protected groups infringes incrementally on the right of private individuals to choose their own associations. Conversely, any refusal to extend the universe of protected classes preserves a corresponding zone of choice to private actors. Also, as noted above, the State may have chosen to effect an expansion of private associational rights, while preserving more generally accepted civil rights protections.

The Plaintiffs next take issue with Amendment 2's tendency to maintain the integrity of established civil rights protections. The circuitous discussion of what type of consensus might be needed to extend civil rights laws misses a simple point: by enacting Amendment 2, the people have clearly said that they do not support the addition of another protected class to existing civil rights laws. This strengthens existing protections in at least two ways. First, as a practical matter, civil rights enforcement bodies will have more budget and staff for their existing mission, rather than be spread thinner into new areas. Second, the addition of each new group with sufficient influence to attain protected status could diminish broad-based respect for the goals and requirements of civil rights laws. Amendment 2 turns back that process.[36]

The Plaintiffs also attempt to dismiss the stated objective of achieving statewide uniformity as mere description, rather than an independent objective. Clearly, the State could have believed it advantageous to enable large employers and property owners to operate under more uniform laws throughout the State. Providing greater economic and legal predictability is a legitimate objective rationally furthered by Amendment 2.

In conclusion, Amendment doe snot encourage or authorize public or priavte discrimination, in contravention of the Fourteenth Amendment. While a state or local government can grant

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[36]The Plaintiffs claim that the State is being "selective" in limiting expansions. The argument inverts reality. The people merely responded to current concerted efforts to expand protections.

more protection than that required by the United States Constitution, the State or local government can rescind that additional protection without committing a federal constitutional violation. Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 538-39 (1982)(upholding a state constitutional amendment prohibiting state courts from ordering forced busing for the purposes of desegregation unless there was a violation of the United States Constitution).

IV. THERE IS NO DANGER OF REAL, IMMEDIATE OR IRREPARABLE INJURY

As noted in Defendants' Brief in Support of their Motion to Dismiss at 10-16, the municipal Plaintiffs have failed to allege any legally protected interest which is, or may be affected by, Amendment 2, and so lack standing to sue, much less seek an injunction, against the State. Board of County Comm'rs v. Fifty-First General Assembly, 198 Colo. 302, 304-05, 599 P.2d 887, 889 (1979).[37] See also City and County of Denver v. State, 788 P.2d 764, 767 (Colo. 1990); National Advertising Co. v. Department of Highways, 751 P.2d 632, 635 (Colo. 1988); City & County of Denver v. Colorado River Water Conservation Dist., 696 P.2d 730, 740 (Colo. 1985). "[T]he equal protection clause of the Fourteenth Amendment was not designed to protect state instrumentalities

[37]This standing analysis would also apply, with even more force, to the Boulder Valley School District. Union High School Dist. No. 2 v. Paul, 105 Colo. 93, 95 P.2d 5 (1939). See also East Jackson Public Schools v. Michigan, 133 Mich. App. 132, 348 N.W.2d 303 (1984).

against state action, much less against the constitutional right of the people 'to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness . . . .'" Board of County Comm'rs v. City and County of Denver, 150 Colo. at 205, 372 P.2d at 156 (quoting Colo. Const. art. II, § 2).

In their separate Memorandum supporting the issuance of an injunction, Aspen City Plaintiffs cite certain state decisions, as well as Missouri v. Jenkins, 495 U.S. 33 (1990) and Washington v. Seattle School Dist. No. 1, in support of their claim for standing. These authorities afford no relief to the governmental Plaintiffs. First, the state cases provide only that ordinances enacted by home rule cities and counties on matters of local concern are not inferior to state statutes passed by the General Assembly on the same subject. That is a far cry from saying that the people cannot forbid, by constitutional amendment, cities and counties from legislating on a particular subject.

Second, in neither Jenkins or Seattle School Dist., was the validity of a state constittuional provision at stake, nor was the relationship of the local entity to the State the same as it is in Colorado, vis-a-vis the right to challenge the validity of a state constitutional amendment. In Colorado, political subdivisions of the State (home rule or otherwise) have no standing, as a matter of law; to challenge the will of the people as expressed in the state constitution. Board of County Comm'rs v. City and County of Denver, 372 P.2d at 156; City and County of Denver v. Sweet, 138

Colo. 41, 49, 329 P.2d 441, 445 (1958). Consequently, as there is no standing to bring an action, there cannot, as a matter of law, be any danger of irreparable injury.

The Plaintiffs allege the existence of an irreparable injury as a matter of law and of fact. Specifically they characterize the following as injurious: (1) the homosexual and bisexual residents of Denver, Boulder, and Aspen will lose the protections of existing anti-discrimination ordinances, (2) homosexuals and bisexuals will be denied the opportunity for equal participation because unique burdens will prevent them from seeking governmental legislation, policies and determinations in this interest, (3) Amendment 2 will encourage threats and actual violence against Colorado's homosexual and bisexual communities without remedies for such threats and violence, and (4) Amendment 2 will chill the plaintiffs' First Amendment rights.[38] Of these allegations, the first, second, and fourth are questions of law. Only the third (Amendment 2 will encourage threats and actual violence) represents a question of fact, and it is based upon subjective emotion, speculation, or conjecture. See American Investors Life Ins. Co., 358 P.2d at 475; Texas Industrial Gas, 828 S.W.2d at 532. It does not support a conclusion of irreparable injury, and therefore the Court should reject it.

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[38]Aspen City Plaintiffs allege the economic effects of the current boycott movement as an additional injury. Even assuming that this is a judicially cognizable injury, nothing indicates that the boycott would end with the granting of a preliminary injunction.

Indeed, since a state constitutional provision is at issue, this Court should require an even more tangible nexus between Amendment 2 and the Plaintiffs' alleged harm. Unable to articulate a real, immediate and irreparable injury supported by substantial, admissible evidence, the Plaintiffs are not entitled to a preliminary injunction.

V. THE PLAINTIFFS HAVE A PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW

The Plaintiffs make no allegations to substantiate their claims other than asserting only that "The Amendment is self-executing, and thus there is no plain, speedy, and adequate remedy at law to delay Amendment 2's enforcement." Plaintiffs' Brief in Support at 21 n.24. It is unclear, given that Amendment 2 is self-executing, what potential enforcement action must be enjoined.[39] Further, the Aspen City Plaintiffs concede that home-rule authority may be altered or reduced by an amendment to the state constitution. Aspen City Plaintiffs' Memorandum of Points and Authorities at 7-8. Consequently, no remedy under the law is called for, as there is no injury to remedy.

With respect to the individual Plaintiffs, Amendment 2 was not understood as intending to create the climate maintained portrayed in their brief. Where appropriate, they would have recourse to tort laws, Legislative Council of the Colorado General Assembly, An

[39]Plaintiffs are apparently asking this Court for the novel relief of enjoining every other sitting judge in the State from enforcing Amendment 2.

Analysis of 1992 Ballot Proposals (Research Publ. No. 369, 1992) 16, and neither the Amendment's language nor legislative history purport to make inapplicable to homosexuals or bisexuals the general protections of property, contract, employment, or criminal law.

VI. THE GRANTING OF A PRELIMINARY INJUNCTION WILL BE COUNTER TO THE PUBLIC INTEREST

The Plaintiffs cannot show how a preliminary injunction will serve the public interest. The Plaintiffs cite an alleged substantial public controversy to satisfy this requirement. Plaintiffs' Brief in Support at 21 n.24 (implying that minimizing that controversy will serve the public interest). The Defendants submit that minimizing the controversy, at the expense of subverting the will of the people as expressed in their Constitution, must per se amount to a gross disservice to the public interest. Although the Plaintiffs may argue that an injunction will not harm the public interest because Amendment 2's consequences are non-existent for a majority of the public, a lack of harm as a result of preliminary injunction does not justify the injunction. Matter of Will of O'Brien, 174 A.D.2d 982, 572 N.Y.S.2d 145, 145 (1991).

Moreover, nothing indicates that a granting of the injunction would end the boycott and, indeed, granting the injunction would prolong the uncertainty which could be avoided by ruling on the dispositive Motion to Dismiss. Furthermore, if the Court granted

an injunction, it would have to be predicated upon the extreme interpretation urged by the Plaintiffs, that Amendment 2 represents a statewide endorsement of hate. Ironically, this would only serve to exacerbate public divisiveness, and increase the potential for the private retribution and other hostile reactions feared by the Plaintiffs. Accordingly, the Court should conclude that the public interest would not be served by granting the Plaintiffs' motions.

VII. THE BALANCE OF EQUITIES DO NOT FAVOR THE GRANTING OF AN INJUNCTION

In urging the Court to find that the balance of the relative equities favors the granting of an injunction, Plaintiffs offer little more than self-serving conclusory statements. Such an assertion, cannot, as a matter of law, be found to satisfy this requirement. A preliminary injunction should not be granted if the benefits of granting it do not outweigh the possible injury. Heritage Standard Bank and Trust Co. v. Steel City Nat'l Bank, 234 Ill.App.3d 48, 599 N.E.2d 1283, 1287 (1992); Prentice Medical Corp. v. Todd, 145 Ill.App.3d 692, 697, 495 N.E.2d 1044 (1986). Here, as presented above, the benefits are the avoidance of subjective fears and speculative and conjectural harms. By contrast, the possible injury from a preliminary injunction is the denial of the will of the people in the event Amendment 2 is ultimately determined to be lawful; continued non-statewide uniformity on the issue of homosexual and bisexual rights; the dilution of existing civil rights; disruption of the right of free exercise of religion; and

governmental interference with the right to association. For this reason too, a preliminary injunction should not be granted.

CONCLUSION

For the foregoing reasons, based upon the authorities cited, Defendants respectfully request that this Court deny Plaintiffs' Motions for Preliminary Injunction as ill-founded.

Respectfully submitted this 8th day of January, 1993.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION on all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 8th day of January 1993, addressed as follows:

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